

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 287**

**WSC 1049//2010**

**Provision of a Medical Test and Inoculation of WSC Employees with HAV**

This call for tenders was published in the Government Gazette on 28<sup>th</sup> December 2010. The closing date for this call with an estimated budget of € 30,000 was 24<sup>th</sup> January 2011.

Two (2) tenderers submitted their offers.

GP Group Ltd filed an objection on 24March 2011 against the decision by the Water Service Corporation to recommend tender award to Dr J Portelli Demajo for presenting the cheaper bid.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Carmel Esposito as members convened a public hearing on Wednesday, 11<sup>th</sup> May 2011 to discuss this objection.

Present for the hearing were:

### **GP Group Ltd**

Dr David Sammut	Representative
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### **Dr J Portelli Demajo**

Dr Antoine Cremona	Legal Representative
Dr J Portelli Demajo	Representative

### **Water Services Corporation (WSC)**

Mr Marco Perez	Representative
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#### **Evaluation Board:**

Ing. Tonio Muscat	Chairman
Mr Emmanuel Galea	Member
Mr Ing. Paul Micallef	Member
Mr Alfred Lia	Member
Mr Anthony Camilleri	Secretary

After the Chairman's brief introduction, the appellant company was invited to explain the motives of his objection.

Dr David Sammut, legal representative of GP Group Ltd, the appellant company, presented the following explanations:-

- i. according to the standards set out by the World Health Organisation, the Hepatitis B vaccine (HBV) had to be administered in three dosages for the person receiving it to be fully protected;
- ii. the appellant company's tender (the value of which was €38,500) referred to three dosages of HBV as per World Health Organisation directives whereas, in its tender submission (the value of which was €36,882), the recommended tenderer offered two dosages of HBV which was not in line with World Health Organisation directives;  
  
and
- iii. as a result, on comparing the appellants' tender submission with that of Dr J Portelli Demajo on a like-with-like basis, namely each covering three dosages, the said company's offer at €38,500 turned out to be cheaper than that of the recommended tenderer at €44,675.

Ing. Tonio Muscat, chairman of the evaluation board, remarked that:-

- a. it was correct that JP Group Ltd had quoted for three dosages of HBV under items 3 and 4 of the Financial Bid, whereas Dr J Portelli Demajo had quoted for two dosages;
- b. none of the members of the evaluation board had any medical background;
- c. the evaluation board did not seek any advice from the Department of Health because the tender requirements were clearly laid out and there was no need for technical interpretation;
- d. the evaluation board requested inoculation of Water Services Corporation employees with Hepatitis A vaccine (HAV) and HBV and it left it up to the tenderer as to whether it would administer them in two or three dosages;
- e. the tender specifications did not lay down the number of dosages with regard to HAV;  
  
and
- f. the contracting authority relied on the professional competence and ethics of the tenderers to render the requested service in a proper manner.

Mr Emanuel Galea, a member of the evaluation board, stated that (a) the Water Services Corporation has been protecting its employees against Hepatitis A for a number of years, (b) the

Water Services Corporation was instructed by the Occupational Health and Safety Authority to protect a number of employees against Hepatitis A and (c) the contracting authority did not specify that HBV had to be administered in two or three dosages but left it at the discretion of the bidders to provide the service requested so as to offer whichever product/service they preferred.

The Chairman Public Contracts Review Board declared that a board that had to evaluate a tender for the provision of medical supplies and services should have had at least one of its members with a medical background to, for example, evaluate whether HBV had to be administered in two or with three dosages or, alternatively, the evaluation board could have obtained the advice of the Health Department.

Dr Antoine Cremona, legal representative of the recommended tenderer, made the following submission:-

- contrary to what had been stated that it was left up to the tenderer to choose the type of service one desired, Clause 2 of the 'Special Conditions' of the tender document laid down in detail what the bidder had to provide, namely:
  - a) to conduct a blood test for all employees exposed to wastewater operations to determine if or which employees require the HAV;
  - b) to issue an individual report for each employee to show the result of the blood test and submit such report to the Water Services Corporation HR Department. This is to include a detailed analysis of the employee's medical condition in view of: this test;
  - c) to provide the first dose of HAV only to those employees who require the vaccination;
  - d) the successful tenderer must finalise the services mentioned in a), b) and c) by end of March 2011;
  - e) to provide a second dose of HAV, 'if required, as a follow-up of (c) above;
  - f) to give medical advice to the Corporation in regards to types of vaccinations needed for proper immunization;
  - g) to provide clear information regarding any possible side effects and to follow up any side effects which might affect vaccinated employees;
  - h) the successful tenderer may be requested to provide HBV vaccination in cases where an employee has not yet been vaccinated against Hepatitis B. The successful tenderer has to specify if the HAV and HBV doses can be administered through one vaccine
- to adjudicate this tender the evaluators did not have to have a medical background though, for good practice, it was admitted that it would have been better if one of the members were to have such a medical background;

- moreover, clause 4 called on the successful tenderer to adhere faithfully to the provisions of the Code of Ethics as contemplated by the Law and that, Dr Cremona proceeded, stated that that included World Health Organisation instructions;
- the evaluation board had to decide (i) on whether the bidders were compliant with the standard specifications and (ii) on the cheapest price;
- regarding the price
  - a. the cost of the vaccine was regulated and uniform whether it was for the first, second or third dosage and it was established as the retail price set by the supplier of the vaccine;
  - b. the only supplier of the product (Messrs Alfred Gera & Sons) had set the price of the HBV – item 3 in the Financial Bid - at €22.27 which was the price quoted by his client whereas, for the same item, the appellant company quoted the unit rate of € 21, which also included the administration fee, which was less than the regulated retail price;
 

and
  - c. the code of ethics stipulated that doctors could not purchase a vaccine at a discounted price

Dr Sammut confirmed that the unit price of €21 he quoted for item 3 was an all inclusive price and once the administration fee represented about €4 then the unit cost of the vaccine worked out at €17. Dr Sammut conceded that the unit price of €21 that the company offered under item 3 was a discounted price offered by the supplier and he acknowledged that discounted prices were in breach of the code of ethics.

The Chairman Public Contracts Review Board, while acknowledging the appellant company's quick admission, even when not even under oath, at the same time he could not help declaring that it was unprofessional to operate in violation of ethics.

Dr Sammut pointed out that, whereas against item 2 in the 'Financial Bid' two dosages of HAV were indicated, there was no such indication against item 3 for HBV and, as a result, it followed that, with regard to Hepatitis B, the three dosages – and not two - had to be administered as stipulated by the World Health Organisation.

Dr Cremona declared that the appellant company's bid should be disqualified for being in breach of clause 4 of the 'Special Conditions' and, consequently, the only offer that would remain was that of his client.

Dr Portelli Demajo made the following remarks:-

- a. with regard to HAV it was clearly stipulated that two dosages had to be administered;

- b. according to the World Health Organisation two dosages provided immunity for a number of years whereas three dosages provided immunity for life; and
- c. while he was aware that the Water Services Corporation had already provided an immunisation programme for Hepatitis B to its employees, yet it could be that some employees may have already had only one or two dosages or none at all and, therefore, there could be cases where an employee required one, two or three dosage/s to be fully covered.

The Chairman Public Contracts Review Board observed that once (i) the number of employees indicated in the 'Financial Bid' was "for adjudicating purposes only" and (ii) the number of dosages for Hepatitis B had not been specified in sub-clause (g) of clause 2 of the 'Special Conditions' which read:

*"The successful tenderer may be requested to provide HBV vaccination in cases where an employee has not yet been vaccinated against HB ...."*

then, what really mattered with regard to HBV was the unit rate - irrespective of the actual number of unvaccinated employees and the number of dosages that would, eventually, be required – so that the contracting authority would know the charge for each vaccination when the case arose. At this stage, the Chairman Public Contracts Review Board intervened to remark that the estimated number of employees and the estimated number of dosages should have been used for internal purposes only, e.g. to arrive at the budget required to service this contract, and as such these details could have been left out of the tender document.

Dr Cremona noted that the difficulty seemed to arise with regard to HBV and he remarked that, the way sub-clause (g) of clause 2 of the 'Special Conditions' was worded, the term 'may' did not render HBV a mandatory requirement and, for all intents and purposes, his client could have opted not to offer that service and the said tenderer would still have been compliant with mandatory tender requirements. Dr Cremona also noted that in the 'Financial Bid', under 'Description of Services' of items 2 to 4, reference was made to 'Rate per vaccination' and, as such, bidders were not required to indicate the number of dosages etc as his client erroneously did.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 24 March 2011 and also through their verbal submissions presented during the hearing held on 11<sup>th</sup> May 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) according to the standards set out by the World Health Organisation, the Hepatitis B vaccine (HBV) had to be administered in three

dosages for the person receiving it to be fully protected, (b) the appellant company's tender (the value of which was €38,500) referred to three dosages of HBV as per World Health Organisation directives whereas, in its tender submission (the value of which was €36,882), the recommended tenderer offered two dosages of HBV which was not in line with World Health Organisation directives and (c) as a result, on comparing the appellants' tender submission with that of Dr J Portelli Demajo on a like-with-like basis, namely each covering three dosages, the said company's offer at €38,500 turned out to be cheaper than that of the recommended tenderer at €44,675;

- having considered the contracting authority's representative's reference to the fact that (a) it was correct that JP Group Ltd had quoted for three dosages of HBV under items 3 and 4 of the Financial Bid, whereas Dr J Portelli Demajo had quoted for two dosages, (b) none of the members of the evaluation board had any medical background, (c) the evaluation board did not seek any advice from the Department of Health because the tender requirements were clearly laid out and there was no need for technical interpretation, (d) the evaluation board requested inoculation of Water Services Corporation employees with Hepatitis A vaccine (HAV) and HBV and it left it up to the tenderer as to whether it would administer them in two or three dosages, (e) the tender specifications did not lay down the number of dosages with regard to HAV, (f) the contracting authority relied on the professional competence and ethics of the tenderers to render the requested service in a proper manner, (g) the Water Services Corporation was instructed by the Occupational Health and Safety Authority to protect a number of employees against Hepatitis A, (h) the unit price of €21 quoted by the appellant company for item 3 was an all inclusive price and once the administration fee represented about €4 then the unit cost of the vaccine worked out at €17 meaning that the unit price of €21 that the appellant company offered under item 3 was a discounted price offered by the supplier and that, as a result, the appellant company's representative was acknowledging that discounted prices were in breach of the code of ethics and (i) whereas against item 2 in the 'Financial Bid' two dosages of HAV were indicated, there was no such indication against item 3 for HBV and, as a result, it followed that, with regard to Hepatitis B, the three dosages – and not two - had to be administered as stipulated by the World Health Organisation:
- having taken note of the recommended tenderer's representatives' arguments, particularly, the fact that (a) contrary to what had been stated that it was left up to the tenderer to choose the type of service one desired, Clause 2 of the 'Special Conditions' of the tender document laid down in detail what the bidder had to provide, of which one could mention, (1) to conduct a blood test for all employees exposed to wastewater operations to determine if or which employees require the HAV, (2) to issue an individual report for each employee to show the result of the blood test and submit such report to the Water Services Corporation HR Department, (3) to provide the first dose of HAV only to those employees who require the vaccination, (4) to provide a second dose of HAV, 'if required, as a follow-up of (3) above, (5) to give medical advice to the Corporation in regards to types of vaccinations needed for proper immunization, (6) the successful tenderer may be requested to provide HBV vaccination in cases where an employee has not yet been vaccinated against Hepatitis B and (7) the successful tenderer has to specify if the HAV and HBV doses can be administered through one vaccine, (b) albeit to adjudicate this tender the evaluators did not have to have a medical background

yet, for good practice, it would have been better if one of the members were to have such a medical background, (c) clause 4 called on the successful tenderer to adhere faithfully to the provisions of the Code of Ethics as contemplated by the Law and that included World Health Organisation instructions, (d) the evaluation board had to decide (1) on whether the bidders were compliant with the standard specifications and (2) on the cheapest price, (d) the cost of the vaccine was regulated and uniform whether it was for the first, second or third dosage and it was established as the retail price set by the supplier of the vaccine, (e) the only supplier of the product (Messrs Alfred Gera & Sons) had set the price of the HBV – item 3 in the Financial Bid - at €22.27 which was the price quoted by the recommended tenderer whereas, for the same item, the appellant company quoted the unit rate of € 21, which also included the administration fee, which was less than the regulated retail price, (f) the code of ethics stipulated that doctors could not purchase a vaccine at a discounted price, (g) the appellant company's bid should be disqualified for being in breach of clause 4 of the 'Special Conditions' and, consequently, the only offer that would remain was that of the recommended tenderer, (h) with regard to HAV it was clearly stipulated that two dosages had to be administered, (i) according to the World Health Organisation two dosages provided immunity for a number of years whereas three dosages provided immunity for life, (j) while the recommended tenderer was aware that the Water Services Corporation had already provided an immunisation programme for Hepatitis B to its employees, yet it could be that some employees may have already had only one or two dosages or none at all and, therefore, there could be cases where an employee required one, two or three dosage/s to be fully covered, (k) whilst the difficulty seemed to arise with regard to HBV, the way sub-clause (g) of clause 2 of the 'Special Conditions' was worded, the term 'may' did not render HBV a mandatory requirement and, for all intents and purposes, the recommended tenderer could have opted not to offer that service and the said tenderer would still have been compliant with mandatory tender requirements and (l) in the 'Financial Bid', under 'Description of Services' of items 2 to 4, reference was made to 'Rate per vaccination' and, as such, bidders were not required to indicate the number of dosages etc as the same recommended tenderer, erroneously, did,

reached the following conclusions, namely:

1. The Public Contracts Review Board argues that the composition of the adjudication board left to be desired in view of the fact that none of the members of the evaluation board had any medical background and, to make matters worse, the evaluation board did not seek any advice from the Department of Health relying on, predominantly, the professional competence and ethics of the tenderers. Furthermore, in the absence of related professional competence, this Board finds it odd that the evaluation board requested inoculation of Water Services Corporation employees with HAV and HBV leaving it up to the tenderer as to whether it would administer them in two or three dosages. This Board concludes that, ideally, a board that had to evaluate a tender for the provision of medical supplies and services should have had at least one of its members with a medical background to, for example, evaluate whether HBV had to be administered in two or with three dosages.

2. The Public Contracts Review Board, whilst acknowledging that the appellant company's representative was quick to admit, despite not even being under oath, that the unit price of €21 that the company offered under item 3 was a discounted price, yet it cannot overlook the fact that this contravened stipulated business ethics governing the profession.
3. The Public Contracts Review Board contends that once (i) the number of employees indicated in the 'Financial Bid' was "for adjudicating purposes only" and (ii) the number of dosages for Hepatitis B had not been specified in sub-clause (g) of clause 2 of the 'Special Conditions', then, what really mattered with regard to HBV was the unit rate - irrespective of the actual number of unvaccinated employees and the number of dosages that would, eventually, be required – so that the contracting authority would know the charge for each vaccination when the case arose.
4. The Public Contracts Review Board agrees with the recommended tenderer's argument that the way sub-clause (g) of clause 2 of the 'Special Conditions' was worded, the term 'may' did not render HBV a mandatory requirement. Furthermore, under 'Description of Services' of items 2 to 4, reference was made to '*Rate per vaccination*' and, as such, bidders were not required to indicate the number of dosages and so forth as the recommended tenderer erroneously did.

In view of the above this Board finds against the appellant company and also recommends that the deposit paid by the latter should not be reimbursed.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Carmel Esposito  
Member

24 May 2011